

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN P. McCARTHY,

Plaintiff,

Hon. Hugh B. Scott

v.

06CV570A

MICHAEL J. ASTRUE Commissioner of
Social Security¹,

**Report
and
Recommendation**

Defendant.

Before the Court are the parties' respective motions for judgment on the pleadings (Docket Nos. 5 (defendant), 9 (plaintiff cross-motion)).

INTRODUCTION

This is an action brought pursuant to 42 U.S.C. § 405(g) to review the final determination of the Commissioner of Social Security that plaintiff is not disabled and, therefore, is not entitled to disability insurance benefits and/or Supplemental Security Income benefits.

PROCEDURAL BACKGROUND

The plaintiff, John P. McCarthy ("McCarthy" or "plaintiff"), filed an application for disability insurance benefits on April 17, 2003. That application was denied initially and on reconsideration. The plaintiff appeared before Administrative Law Judge William Vest ("ALJ"),

¹On February 12, 2007, Michael J. Astrue was sworn in as Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Mr. Astrue is substituted for now former Commissioner Jo Anne B. Barnhart as Defendant in this action; no further action is required, 42 U.S.C. § 405(g).

who considered the case de novo and concluded, in a written decision dated March 23, 2005, that the plaintiff was not disabled within the meaning of the Social Security Act. The ALJ's decision became the final decision of the Commissioner on June 23, 2006, when the Appeals Council denied plaintiff's request for review.

Plaintiff commenced this action on August 24, 2006 (Docket No. 1). The parties moved for judgment on the pleadings (Docket Nos. 5, 9). The motions were deemed submitted on papers on May 14, 2007 (Docket No. 15).

FACTUAL BACKGROUND²

Plaintiff was born in June 1954 and was fifty years old when the ALJ rendered his decision. Plaintiff has two years of college education. (R. 30, 19.) His past work experience included employment as a machinist and lead machinist. Plaintiff claims he became disabled on March 31, 2000, due to the effects of a closed head injury and residual deficits from shoulder injuries, but plaintiff amended his onset date to July 6, 2000, after an automobile accident. (R. 19.)

MEDICAL AND VOCATIONAL EVIDENCE

Plaintiff suffered a closed head injury and shoulder injury in September 1998 in a work accident that later was exacerbated in the July 2000 automobile accident. During his treatment following the automobile accident, plaintiff acknowledged to Dr. Lynn Warner that he used alcohol regularly since his teenage years and had attended a 28-day rehabilitation program in the 1980s. Following the accident, plaintiff changed from drinking hard liquor to beer and smoking

² References noted as "(R. __)" are to the certified record of the administrative proceedings.

marijuana. (R. 21.) Plaintiff testified at the administrative hearing that he also used cocaine and heroin, testifying that he ceased using cocaine and heroin months before the hearing (R. 25, 33, 626). He stated that he spent between \$200-300 per day in obtaining cocaine and heroin (R. 25). Dr. Warner concluded that plaintiff had a frontal lobe injury and would require detoxification for his substance use, and long-term treatment for his brain injury (*id.*). Dr. Warner concluded that plaintiff was “totally disabled” and may never be able to work (R. 27).

ALJ's Findings

In a thorough decision, the Administrative Law Judge found that plaintiff had not engaged in substantial gainful activity since July 2000. He found that plaintiff's rotator cuff injuries, post-concussive syndrome, and substance use disorders were severe impairments, but they singly or collectively did not meet the standards equivalent to a listed impairment under Social Security regulations. (R. 34, 21.) The ALJ found that plaintiff's allegations as to his limitations were not credible, due (in part) to smelling alcohol on plaintiff during the hearing (R. 34, 26). The ALJ used plaintiff's stated daily drug use and the means to feed this habit as substantial gainful activity and proof that he could sustain daily activity (R. 25). The ALJ did not give great weight to Dr. Warner's conclusion, since it reached the ultimate issue of disability reserved to the Commissioner and that Dr. Warner's opinions conflicted with other opinions (including Dr. Warner's) that plaintiff retained the ability to perform simple routine work (R. 27-28).

The ALJ concludes that plaintiff retains the residual functional capacity to lift and carry ten pounds frequently and twenty pounds occasionally; to stand, sit, and walk six hours in an eight-hour day; and push/pull equal to lifting, hence light work (R. 29). The ALJ found that

plaintiff retains the ability to perform simple, routine, repetitive tasks, conceding that his mental function had deteriorated since the July 2000 accident but recognizing that he retained strengths and has demonstrated daily activities that are consistent with regular and continuous simple work (id.).

Vocational expert Robin Stromberg testified that plaintiff's past work as a machinist and lead machinist was medium and heavy exertion, and plaintiff is unable to perform his past work as he is limited to performing only light work (R. 29). Applying the Medical-Vocational Guidelines to plaintiff as a younger individual from the onset date to age 50, under Rules 202.21 and 202.14, plaintiff is deemed not to be disabled since he could perform the full range of light work (R. 30). Therefore, the ALJ found that plaintiff was not disabled (id.).

Alternatively, the ALJ considered giving more weight to Dr. Warner's opinion that plaintiff is unable to sustain the functions of work (R. 30, see Murrell v. Shalala, 43 F.3d 1388 (10th Cir. 1994)). Dr. Warner described plaintiff as being a high functioning individual prior to the accident, but, because of the frontal lobe damage and substance use, plaintiff had deteriorated because he lost his home, is impulsive, and so disorganized that he cannot complete tasks or avoid being distracted (R. 21, 30-31). Accepting Dr. Warner's opinion, the ALJ found that plaintiff had an alternative residual functional capacity of being physically able to perform light work (the lifting, sitting, and standing standards) but plaintiff is unable to understand, remember, and carry out simple tasks, make routine adjustments in a work setting, or use judgment (R. 31). As a result, at the fifth step of the analysis, plaintiff would be deemed disabled, but for his substance use (id.), see Rule 204.00; Soc. Sec. Ruling 85-15. The further step had to be undertaken to determine if plaintiff's use of drugs or alcohol was a contributing factor material to

a finding of disability (id.); see 20 C.F.R. § 404.1535. On determining whether plaintiff had a medically determinable substance abuse disorder, the ALJ found that plaintiff's substance use after onset much more than minimally limits his ability to perform the functions of work (R. 32, 33). Considering the impairments that remain if plaintiff stopped using drugs or alcohol, and resolving all doubts regarding the effects of the July 2000 head injury in plaintiff's favor, the ALJ concluded that plaintiff still could perform the exertional demands of light work involving simple, repetitive tasks (R. 33). Plaintiff's residual functional capacity thus recognizes that his physical condition and limitations remains unchanged with or without plaintiff's substance use and his residual deficits may prevent sustained completion of complex tasks (id.). The ALJ adopts the opinions of Dr. Jeffrey Goodman and the psychological reviewers at the Disability Determination Section that plaintiff retains the capacity to perform the demands of simple repetitive work if plaintiff is not using drugs or alcohol (id.). Thus, under the alternative residual functional capacity, the ALJ found that plaintiff still could perform light unskilled work (R. 33) and that plaintiff's substance use disorders are a contributing factor material to a finding of disability (id.).

DISCUSSION

The only issue to be determined by this Court is whether the ALJ's decision that the plaintiff was not under a disability is supported by substantial evidence. See 42 U.S.C. § 405(g); Rivera v. Sullivan, 923 F.2d 964, 967 (2d Cir. 1991). Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 229 (1938)).

I. Standard

For purposes of both Social Security Insurance and disability insurance benefits, a person is disabled when he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A) & 1382c(a)(3)(A).

Such a disability will be found to exist only if an individual’s “physical or mental impairment or impairments are of such severity that [he or she] is not only unable to do [his or her] previous work but cannot, considering [his or her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy” 42 U.S.C. §§ 423(d)(2)(A) & 1382c(a)(3)(B).

The plaintiff bears the initial burden of showing that his impairment prevents him from returning to his previous type of employment. Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). Once this burden has been met, “the burden shifts to the [Commissioner] to prove the existence of alternative substantial gainful work which exists in the national economy and which the plaintiff could perform.” Id.; see also Dumas v. Schweiker, 712 F.2d 1545, 1551 (2d Cir. 1983); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980).

In order to determine whether the plaintiff is suffering from a disability, the ALJ must employ a five-step inquiry:

- (1) whether the plaintiff is currently working;
- (2) whether the plaintiff suffers from a severe impairment;

(3) whether the impairment is listed in Appendix 1 of the relevant regulations;

(4) whether the impairment prevents the plaintiff from continuing his past relevant work; and

(5) whether the impairment prevents the plaintiff from doing any kind of work.

20 C.F.R. §§ 404.1520 & 416.920; Berry, supra, 675 F.2d at 467. If a plaintiff is found to be either disabled or not disabled at any step in this sequential inquiry, the ALJ's review ends.

20 C.F.R. §§ 404.1520(a) & 416.920(a); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). However, it should be noted that the ALJ has an affirmative duty to fully develop the record. Gold v. Secretary, 463 F.2d 38, 43 (2d Cir. 1972).

In order to determine whether an admitted impairment prevents a claimant from performing his past work, the ALJ is required to review the plaintiff's residual functional capacity and the physical and mental demands of the work he has done in the past. 20 C.F.R.

§§ 404.1520(e) & 416.920(e). When the plaintiff's impairment is a mental one, special "care must be taken to obtain a precise description of the particular job duties which are likely to produce tension and anxiety, e.g. speed, precision, complexity of tasks, independent judgments, working with other people, etc., in order to determine if the claimant's mental impairment is compatible with the performance of such work." See Social Security Ruling 82-62 (1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). The ALJ must then determine the individual's ability to return to his past relevant work given his residual functional capacity.

Washington, supra, 37 F.3d at 1442.

For a claimant engaged in drug or alcohol use, the Social Security Act precludes payment of benefits if alcoholism or drug addiction would be a contributing factor material to a determination of disability, 42 U.S.C. § 423(d)(2)(c), with “material” defined in the regulations as whether or not the claimant would be found disabled if he were to stop using alcohol or drugs, 20 C.F.R. § 404.1535(b)(1). The Commissioner makes a separate determination to see if the physical or mental limitations would remain if claimant stopped using drugs and then determine if any of the remaining limitations would be disabling, id. § 404.1535(b)(2).

II. Application

A. Alleged Legal Errors

In the instant case, plaintiff first argues that there were serious legal errors in the ALJ’s decision and that it should not be sustained despite being supported by substantial evidence (Docket No. 9, Pl. Memo. at 20-21). Plaintiff next argues that the ALJ substituted his opinion for that of plaintiff’s treating physicians for describing his pain, disregarding the pain aspects of his claim and focusing exclusively on mental impaired function (Docket No. 9, Pl. Memo. at 22-23). In discussing the alternative residual functional capacity, the ALJ stated that this was not a pain case (R. 32) and plaintiff objects to this finding (Docket No. 9, Pl. Memo. at 23). Plaintiff notes that his treating physician for the 1998 work-related shoulder injury, Dr. Sheldon Cohn, assigned permanent restrictions in March 2000, due to plaintiff’s right shoulder impairment (Docket No. 9, Pl. Memo. at 23), which the ALJ apparently disregarded.

The Commissioner replies that there is substantial evidence to support the ALJ’s findings that plaintiff was not disabled due to his physical condition. The Commissioner points to the findings of the state agency doctor, Dr. Robert Castle, that plaintiff could perform exertional

demands for light work (Docket No. 6, Def. Memo. at 23; R. 544). Dr. Castle noted that plaintiff did not seek treatment for plaintiff's complaint of chronic headaches, plaintiff did not have severe complications from his shoulder surgery (R. 545), plaintiff did not suffer severe memory loss due to the head injury, and there was no evidence that plaintiff could not perform work due to the repairs to his rotator cuff (R. 549). Dr. Castle also noted that plaintiff was not fully credible (R. 549). Dr. Edward Gold, an examining physician for plaintiff's private insurer, also found that plaintiff could perform light work with restrictions on the weight he could bear with his right shoulder (up to fifteen pounds) and to avoid lifting overhead with the right arm (R. 298-99). Plaintiff complains that Dr. Gold's opinion is not as complete as that of his treating physician, Dr. Cohn, who found that plaintiff had permanent restrictions on his right shoulder (Docket No. 9, Pl. Memo. at 23; R. 231, 232, 234). The Commissioner replies that Dr. Cohn's opinions predate his onset date (Docket No. 12, Def. Reply Memo. at 2-3; R. 132 (July 2000 onset date), 229-45 (Dr. Cohn's reports from 1999 and January 2000)). The Commissioner also notes that the ALJ considered plaintiff's pain level, concluding that it was "mild" (Docket No. 12, Def. Reply Memo. at 1-2; R. 20, 20-21).

Dr. Cohn treated plaintiff from 1998 to April 2000 (R. 170, 229-54, see R. 163-228). Dr. Gold examined plaintiff following the July 2000 accident. Dr. Gold noted that Dr. Cohn released plaintiff to light duty in 2000 (and that he worked at General Electric on light duty until laid off) (R. 297). The permanent restrictions noted by Dr. Cohn limited plaintiff to light work, the residual functional capacity found initially by the ALJ; in fact, Dr. Cohn restricted plaintiff to fifteen pounds while the residual functional capacity limited plaintiff to light work of no more than ten pounds. Thus, there is no basis here to fault the ALJ's findings.

B. Application of Medical-Vocational Guidelines

Next, plaintiff faults the ALJ in applying the Medical-Vocational Guidelines in initially determining that he was not disabled although plaintiff suffered from manipulative impairments and pain (Docket No. 9, Pl. Memo. at 26-27). He argues that the Guidelines were inappropriately used for non-exertional impairments (*id.*), *see Rosa v. Callahan*, 168 F.3d 72 (2d Cir. 1999), and the vocational expert should have been utilized.

The Commissioner replies that plaintiff alleged both exertional and non-exertional impairments and, under the Guidelines rules, 20 C.F.R. § 404.1569a(d), the Guidelines could be applied unless there is another rule that directed a finding of disability due to the claimant's strength limitations (Docket No. 12, Def. Reply Memo. at 4-5).

No other rule applies here to direct a finding of disability due to plaintiff's strength limitations. As discussed above, plaintiff has the strength capability of performing light work.

C. Illegal Activities as Substantial Gainful Activity

Plaintiff argues that the ALJ erred in speculating that plaintiff's illegal activity was similar to substantive gainful activity in determining whether plaintiff was disabled (Docket No. 9, Pl. Memo. at 27-28). The Commissioner contends that plaintiff misinterprets the ALJ's discussion on this point, that the discussion of his substance use (and the means to acquire the substances) did not apply to step one of the analysis for substantial gainful activity (Docket No. 12, Def. Reply Memo. at 7).

The ALJ here referred to plaintiff's daily activity to maintain his cocaine and heroin addictions as requiring "at least a minimum amount of organizing activity on a consistent basis"

(R. 25) showing that plaintiff's mental capacity after the accident (R. 25), and then later factoring in his substance use and whether he was rendered disabled because of it.

D. Alternative Residual Functional Capacity and Substance Use as Factor

As for the alternative residual functional capacity analysis, plaintiff contends that the ALJ erred either in not finding that drugs and alcohol were material in causing his disability or failing to separate the substance use from his post-concussive syndrome to find that drug and alcohol use were not material (id. at 28-34). Plaintiff argues that his substance use cannot be separated from his post-concussive syndrome, hence under Social Security rules and rulings a finding of disability is required, arguing that his situation fell within the Social Security Administration's emergency teletype when it is not possible to separate the mental restrictions from a claimant's substance use (id. at 29-31).

The ALJ made thorough findings in analyzing plaintiff's substance use and determining whether it was a factor in his disability. His substance use predated his injuries and could be separated from the post-concussive syndrome (R. 428 (plaintiff was highly functioning alcoholic before accident), 626-27; see Docket No. 12, Def. Reply Memo. at 7; cf. R. 383 (reports use of cocaine and heroin after accident)), increasing usage of cocaine and heroin after the accident (R. 626-27, 383). The ALJ, in reviewing Dr. Warner's findings, separated plaintiff's mental restrictions from his post-concussive syndrome from his substance use, ruling out any brain injury that would have led to plaintiff's continued substance use (R. 32-33). Thus, it was possible to distinguish the head injuries here from the substance use, and the emergency Social Security Administration teletype is not applicable.

The ALJ relied upon Dr. Warner's and Dr. Goodman's opinions, that plaintiff retains the mental capacity to perform simple, repetitive tasks (R. 523) and that his condition was materially affected by his substance use, in concluding that plaintiff was not disabled in this alternative residual functional capacity. Since the Medical-Vocational Guidelines applicable to plaintiff called for unskilled work, see SSR 83-10, plaintiff had the mental capacity (but for his substance use) to perform unskilled work. Therefore, it is recommended that the Commissioner's extensive findings be upheld.

CONCLUSION

For the foregoing reasons, this Court recommends that the decision of the Commissioner be **UPHELD**. Defendant's motion for judgment on the pleadings (Docket No. 5) should be **granted** and plaintiff's cross-motion for similar relief in his favor (Docket No. 9) should be **denied**.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy to the Report & Recommendation to all parties.

Any objections to this Report & Recommendation *must* be filed with the Clerk of this Court *within ten (10) days* after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b) and W.D.N.Y. Local Civil Rule 72.3(a). Failure to file objections to this report & recommendation within the specified time or to request an extension of such time waives the right to appeal any subsequent district court's order adopting the recommendations contained herein. Thomas

v. Arn, 474 U.S. 140 (1985); F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d Cir. 1995);
Wesolak v. Canadair Ltd., 838 F.2d 55 (2d Cir. 1988).

The District Court on de novo review will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to W.D.N.Y. Local Civil Rule 72.3(a)(3), “written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority.” **Failure to comply with the provisions of Rule 72.3(a)(3) may result in the District Court’s refusal to consider the objection.**

So Ordered.

Buffalo, New York
July 23, 2007

/s/ Hugh B. Scott
Hon. Hugh B. Scott
United States Magistrate Judge